And the answer to this question lies in the letter of his then solicitors of November 7, 1975. The part played by the respondent in effecting the purchase is clear and beyond argument. Confirmation, if necessary, can be found in the previous correspondence between the parties in person. The appellant had long desired to buy but could only do so through the respondent. Until April 1975, his efforts had failed. On April 29, 1975, he raised his offer to $55,000, when it was suggested to him by the respondent that the matter was of some urgency since one of the owners to whom he was related was in frail health. The respondent later in November of the same year obtained the consent of all the owners directly and in some cases, indirectly, to a sale at $65,000 per acre and he succeeded in interesting the appellant at this price as evidenced by his accepting a so-called sub-option and giving his own promise to pay brokerage and by his instructing M/s. T. Tharu & Co. to buy at this price.

Neither the Senior Assistant Registrar nor the High Court Judge had any doubt about the part played by the respondent. They could not understand how his introduction of the appellant's nominee to the vendors could be regarded as never having happened at all because of an initial mistake, later amply corrected, made in rejecting the option held by him.

For ourselves, we would put the case thus: suppose the respondent never had any option at all, but the sale was effected in truth and in fact through his introducing the purchaser to the vendors or to borrow a term from the Stock Exchange, if a valid contract was the result of the 'marriage' of the vendors' offer to sell and the purchaser's offer to buy through the intermediation of the broker arising from his knowledge or information gained by him that the vendors were prepared to sell at a certain price and the purchaser was agreeable to buying at that price, could the respondent be said not to be the broker who had brought about the sale and could he be denied the commission the purchaser had promised to pay?

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *G.T. Rajan & Co.; Skrine & Co.*

TAN BOON HOCK v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ., Tan Chiaw Thong & Yusoff JJ.) November 22, 1978]

[Kuching — Federal Court Criminal Reference No. 2 of 1978]

Criminal Law and Procedure — Conviction quashed on appeal — Whether appellate court has power to order retrial — Whether appellate court can release appellant on bail — Criminal Procedure Code (F.M.S. Cap. 6) ss. 4, 5, 316(b), 390(ii) — Courts of Judicature Act, 1964, ss. 22, 26, 30.

In this case the appellant had been convicted on a charge which alleged that he "detained" stolen property. On appeal the conviction was quashed and the learned judge ordered a retrial and also ordered the release of the appellant on bail to appear before the District Court. The learned judge thereupon reserved the following two questions for the opinion of the Federal Court —

1. Whether a judge of the High Court sitting as an appellate court has jurisdiction to order the appellant to be retried on a proper charge after quashing his conviction on the ground that on account of the wording of the charge the appellant was charged and convicted of an offence unknown to the law.

2. Whether a judge of the High Court sitting as an appellate court has jurisdiction on the application of the appellant or his counsel to make an order releasing the appellant on bail in the sum of $500 with one surety and to appear before a Magistrate when called upon to do so when ordering the appellant to be retried on a proper charge after quashing his conviction.

Held: (1) the power of an appellate court to order a retrial on a proper charge before another Magistrate when it is of opinion that an accused person was convicted on a wrong charge is discretionary. In the present case since it was held there was no proper charge ordering a retrial was most appropriate and the learned judge had exercised his discretion properly;

(2) since the learned judge had ordered a retrial he had power to order the appellant to be released on bail and to appear before a District Judge.

Case referred to:-

(1) *D.P.P. of Jamaica* v. *White* [1978] 3 All E.R. 1003.

FEDERAL COURT.

T.O. Thomas for the appellant.

Abdul Khalid bin Abdul Manaff (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): We stated that the answers to both questions were in the affirmative and that we would give our reasons later. We do so now.

Appellant was convicted on his own plea and sentenced to one month's imprisonment by the District Court on the following charge: —

"That you sometime in the month of July 1975 at 10.15 a.m. at Padungan Road, Kuching, dishonestly detained stolen property, to wit, one car tape-recorder, belonging to Lim Chiang Hua (m) having reason to believe the same to be stolen property and thereby committed an offence punishable under section 411 of the Penal Code."

On appeal the prosecution conceded that appellant was convicted of an offence unknown to law by reason of the fact that the word "detained" was used instead of "retained". Consequently, the learned judge quashed the conviction, set aside the sentence, ordered a retrial before another magistrate and also ordered the release of appellant on bail to appear before the District Court. On the application of appellant, that in deciding the appeal the learned judge had no jurisdiction to quash the conviction and at the same time order a retrial and release of appellant on

bail the learned judge reserved for this court two questions of law under section 66 of the Courts of Judicature Act, 1964. The two questions read: —

1. Whether a Judge of the High Court sitting as an appellate court has jurisdiction to order the appellant to be retried on a proper charge after quashing his conviction on the ground that on account of the wording of the charge, the appellant was charged and convicted of an offence unknown to law.
2. Whether a Judge of the High Court sitting as an appellate court has jurisdiction on the application of the appellant or his counsel, to make an order releasing the appellant on bail in the sum of $500 with one surety and to appear before a magistrate when called upon to do so when ordering the appellant to be retried on a proper charge after quashing his conviction.

We need only refer to the recent case of *D.P.P. of Jamaica* v. *White*[1] where the respondent was charged with two counts and the jury returned a verdict of guilty on both counts after retiring for 27 minutes only. The verdict was unanimous on only one of the counts. It could not be ascertained on which count the verdict was unanimous. By section 44(3) of the Jury Law of Jamaica one hour had to elapse before a majority verdict could be returned. Respondent appealed against his convictions and the prosecution did not seek to support them. The jurisdiction of the Court of Appeal is wholly statutory being covered by the Judicature (Appellate Jurisdiction) Act. Under section 14(1) of the Act it could allow an appeal against conviction on the ground that the judgment of the trial court was wrong on question of law or that there was a miscarriage of justice. Under section 14(2) in allowing the appeal against conviction it was required to quash the conviction and either direct entry of a verdict of acquittal or, if the interests of justice so required, order a new trial. It merely quashed the appellant's conviction on the ground that there had been a mistrial which rendered the trial a nullity. The prosecution appealed. Allowing the appeal, the Privy Council held that by virtue of section 14(2) of the Act the Court of Appeal had two courses open to it in allowing the appeal, that is, to direct entry of a verdict of acquittal or to order a new trial. The case was remitted to the Court of Appeal to consider which of these two courses it would take. It is clear that the jurisdiction of an appellate court depends on the construction of the statute or statutes conferring jurisdiction on that court.

Section 316(b) of the Criminal Procedure Code states that at the hearing of the appeal the judge may dismiss the appeal or, if he considers there is sufficient ground for interfering, he may

"(b) in an appeal from a conviction or in an appeal as to sentence (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried or committed for trial; or (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence."

Under the provisions in allowing an appeal against conviction, an appellate court may reverse the finding and sentence and make any of the following orders: —

(a) acquit the accused; or
(b) discharge the accused; or
(c) order accused to be retried; or
(d) order accused to be committed for trial.

As appellant was charged with an offence unknown to law, the prosecution could not support the conviction. An appeal against conviction lays open the whole case before the appellate court. The conviction was clearly wrong in law. By quashing the conviction and setting aside the judgment the appellate court was clearly following the provisions of section 316(b), that is, reversing the finding and sentence. The power of an appellate court to order a retrial on a proper charge before another magistrate when it is of the opinion that an accused was convicted on a wrong charge is discretionary. In the present case since it was held there was no proper charge ordering a retrial is most appropriate. The learned judge has exercised his discretion properly.

As to the question of bail, appellant has no reason to complain. A perusal of the record shows that Encik T.O. Thomas, counsel for appellant, applied for bail and the prosecution not objecting, the learned judge granted the application. Section 411 of the Penal Code is a non-bailable offence and an accused may be arrested without warrant. Since the learned judge has ordered a retrial he has power to order the appellant to be released on bail and to appear before a District Court. See section 390(ii) of the Criminal Procedure Code. Furthermore, the appellant conceded that if he succeeded in the first question there was no need for the second question.

The High Court has jurisdiction to try all offences including offences under the Penal Code committed within its local jurisdiction. See section 22 of the Courts of Judicature Act, 1964. It not only has appellate criminal jurisdiction but also revisionary power over all subordinate courts. See sections 26 and 30 of the said Act. Section 4 of the Criminal Procedure Code says nothing in the Code shall be construed as derogating from the powers or jurisdiction of the High Court. In matters of criminal procedure, section 5 of the Code lays down that English law shall apply where no provision is made by the Code or by any other law. Without calling in aid English law the High Court certainly has power to do all those acts which are the subject of the reference. But, if English authority is necessary, it is sufficient to refer to *Halsbury's* Laws of England, 4th Edition, Volume 11, page 375, paragraph 626 which says: —

"Further, where the Court of Appeal orders an appellant to be retried, on making the order it may make such orders as appear to it to be necessary or expedient for the custody or admission to bail of the appellant pending his retrial."

The appellate jurisdiction of the High Court is clear. The learned judge was right to quash the conviction, order a retrial before another magistrate and release appellant on bail to appear before the magistrate on a proper charge.

Order accordingly.

Solicitors: *Thomas & Co.*